In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-561

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

PATRICK SCHMALTZ,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

DEFENDANT HEREIN, Patrick Schmaltz petitions for Writ of Certiorari as follows:

OPINIONS BELOW

The order of the United States Court of Appeals for the Eighth Circuit denying the defendant's appeal to overturn the jury verdict in the above case or direct that a new trial be held in the above-entitled case, is dated August 24, 1977. The mandate of the United States Circuit Court of Appeals for the Eighth Circuit affirming the judgment and sentencing order of the District Court for the Southwestern Division of North Dakota was filed on September 19, 1977, and said decision (#77-1245) is not yet reported. (See Appendix A of this Petition for Opinion)

JURISDICTION

The jurisdiction of this court is invoked pursuant to Article III, Sections 1 and 2 of the Constitution of the United States of America; Title 28, Section 1254, United States Code; Title 28, Section 2106, United States Code; and Rule 19 of the Rules of the Supreme Court of the United States. The judgments, decrees, and orders sought to be reviewed and their time of entry are as follows:

(i) Decision of the United States Court of Appeals for the Eighth Circuit dated August 24, 1977, denying the defendant's appeal for overturning his conviction or direction for a new trial. Opinion of the United States Court of Appeals for the Eighth Circuit was filed on September 19, 1977.

(ii) Judgment and sentencing order entered the 18th day of February, 1977 by the United States District Court, District of North Dakota, Southwestern Division.

QUESTION PRESENTED

The question presented for review is:

ARE THE FIRST AMENDMENT OR DUE PROCESS RIGHTS VIOLATED WHERE VERBAL ACTS ALONE ARE SUFFICIENT TO SUSTAIN A CONVICTION AS A CO-CONSPIRATOR WHERE NO SUBSEQUENT CRIMINAL ACTION TAKES PLACE, NOR CAN THE INDIVIDUAL THUS CONVICTED BE CONNECTED TO ANY PRIOR CRIMINAL ACTIVITY OF THE CONSPIRACY, NOR TO THE AGREEMENT THAT ESTABLISHES THE CONSPIRACY ITSELF?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the 1st Amendment and the due process clause of the 14th Amendment to the United States Constitution.

STATEMENT OF CASE

Petitioner, Patrick Schmaltz, was indicted on September 15, 1977, by a Federal Grand Jury of Conspiracy to distribute DL-Methamphetamine Hydrochloride in violation of 21 U.S.C., Section 841 (a) (1) and Section 846. The indictment involved five counts with five co-defendants. The first four counts involved substantive charges of sale of controlled substances. Mr. Schmaltz was not indicted under any of the substantive acts of sale. (See Appendix B of this Petition) Mr. Schmaltz's only alleged connection with the conspiracy involved a conversation dated August 26th where a co-defendant and Mr. Schmaltz and two narcotics agents allegedly discussed aspects of amphetamine production. This conversation did not result in any sale, production of, or any future meetings between Schmaltz, other co-defendants or any of the narcotics agents. During the trial, the other co-defenants all testified, even after three of them had pled guilty to substantive counts, that Mr. Schmaltz was never involved in any of the drug transactions nor assisted nor arranged for any aspects of the alleged conspiracy. All the narcotics agents who testified, including those present at the August 26th conversation, indicated that they had no information connecting Mr. Schmaltz to any of the alleged criminal activities which were part of the conspiracy.

The narcotics agents, who were present at the conversation, both testified that no agreement resulted from the

conversation connecting Mr. Schmaltz to possible future sales of drugs, past sales, or future production of drugs.

The basis then for petitioner Schmaltz's conviction rests solely on a conversation carried on with narcotics agents dealing with the production of amphetamines. No actions were ever carried out by Mr. Schmaltz pursuant to this conversation, nor was Mr. Schmaltz ever observed conducting illegal activities involving the sale or distribution of these controlled substances. Mr. Schmaltz's conviction rests upon a single conversation out of which no criminal act resulted nor was arranged for.

REASONS FOR GRANTING WRIT

Argument at Law

Legal scholars have expressed concern regarding the possibility that conspiracy charges could be based upon speech utterances alone leading to significant violation of constitutional rights. Thomas Church in *"Conspiracy Doctrine in Speech Offenses"*, CORNELL LAW REVIEW, Volume 60 (1975), at page 575 states:

> Because of the dangers inherent in the conspiracy law, caution should accompany its application at the simplest substantive offense. Even conspiracy to rob a bank, despite the relatively clear focus provided by an unambiguous conspiratorial objective, can involve a consideration complication and opportunity for unfairness to the defendants. When the crime of conspiracy, already one step removed from an observable action—is applied to a substantive crime involving speech uttered with a necessary intent or having a particular tendency, the law in its traditional safeguards are even further removed from the concrete

> world of observable action into what can easily become a morass of highly subjective and ultimately unreliable inferences.

Mr. Church is basically saying that when you deal with speech as the only basis for a conspiratorial tie, it should be scrutinized much more closely because of the possibility of misinterpretation and misunderstanding dealing with what is said and the intent of what is said. Church's concern is expressed by David B. Filvaroff in *"Conspiracy in the First Amendment"*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, December, 1972, page 199:

> So conceived there is a deep seeded conflict between traditional conspiracy doctrine and the law of free speech. As noted, conspiracy alone requires only agreement, intent and illegal purpose. When speech is involved, however, the First Amendment requires more. There must be a sufficient governmental interest to warrant suppression. Even then, only advocacy of action, actual incitement itself, may be barred. Finally, some measure must be taken of the reality of the threat posed by the challenge speech.

Furthermore, due process rights of the petitioner were violated under the standard of proof applied to this fact situation by the Eighth Circuit. This standard appears to only compound the abuses of future criminal convictions resting only on the spoken word. The Eighth Circuit Court concluded that a conspiracy was proved when the other co-defendants participated in and sold narcotics during the summer of 1976. This establishment of a conspiracy did not need to include any proof that the petitioner was himself a member of that conspiracy. The only thing that the Eighth Circuit required was just "slight evidence

connecting the defendant to the conspiracy may be sufficient proof of his involvement in the scheme". This standard of proof enunciated by the Eighth Circuit in this case leads to a greater danger that First Amendment rights will be trampled upon when only a minimal amount of proof is allowed to support convictions of alleged co-conspirators. This standard of proof in conspiracy cases seems to be in conflict with other circuits which demand proof of knowledge, and participation and agreement by a co-conspirator regarding the activities of the conspiracy. In *U. S.* v. *Hysohion,* 448 F. 2d 343 (1971), the Second Circuit stated that it must be shown that the individual who is charged with a conspiracy was well aware or would have the knowledge of the scope and breadth of that conspiracy. The court stated:

> . . . Absent proof of knowledge of a broader conspiracy, a single act such as the delivery of the drugs . . . or actual sale . . . or purchase . . . is insufficient evidence from which to draw an inference that the defendant knew about or acquiesced in the larger conspiracy *U. S.* v. *Torres,* 503 F. 2d 1120, 1123 (Second Circuit, 1974).

The Sixth Circuit also points out that more proof must be needed in order to connect one to a conspiracy. In *U. S.* v. *Webb,* 394 F. 2d 558, 562 (1966), the Sixth Circuit stated:

> The evidence puts defendant Stokely at the scene of the events which positively or by fair inference could be deemed to be part of the moonshine liquor distribution conspiracy. But this record is devoid of any testimony which links the defendant to any intrical element of such plan, except by presence and association.

That circuit also found in *United States* v. *Williams,* 503 F. 2d 50-54 (1974, Sixth Circuit) that:

> . . . Mere knowledge, approval of or an acquiescence in the object of the purpose of a conspiracy, without an intention and agreement to cooperate in a crime is not sufficient to make one a conspirator. (Court cites *Cleaver* v. *U. S.,* 238 F. 2d 766, 771 (Tenth Circuit, 1956).

It is submitted that the Eighth Circuit Court of Appeals erred in holding that sufficient grounds existed to uphold conviction of the petitioner as a co-conspirator. Primarily, this error has resulted from allowing this minimal standard of proof to be applied in a situation where First Amendment and due process rights are involved. The conviction of the petitioner rests solely upon a conversation. At no time was there evidence to connect the petitioner to any activities of the conspiracy itself. The only evidence to indicate any type of involvement or knowledge of the conspiracy is based upon a single conversation, no concrete evidence either in the form of controlled substances or money or documents relating to that conversation were introduced to support the assertion that Mr. Schmaltz was aware of a conspiracy or agreed to participate in it. The Eighth Circuit standard of proof enunciated in their opinion allowing only for a "slight evidence connecting a defendant to a conspiracy may be sufficient proof of envolvement" is in direct conflict with other circuits which require a greater demonstration of knowledge, participation and consent in the purpose and activities of the conspiracy.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted in light of a conviction which infringes upon First Amendment rights and a standard of proof which allows for the upholding of criminal convictions without significant evidence to prove the participation of a co-conspirator.

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PROOF OF SERVICE—CERTIFICATE OF SERVICE
SERVICE BY MAIL

I, Charles W. LaGrave co-counsel for petitioner herein, hereby certify that on October ....., 1977, I served a copy of the foregoing and attached Petition for Writ of Certiorari on United States of America, respondent herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid to James Hill, Assistant U. S. Attorney, attorneys for respondent United States of America at Bismarck, North Dakota, 58501.

CHARLES W. LAGRAVE
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Bismarck, North Dakota 58501

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1245

United States of America,
Appellee,
v.
Patrick Schmaltz,
Appellant.

Appeal from the United States District Court for the District of North Dakota.

Submitted: August 24, 1977
Filed: September 19, 1977

Before HEANEY, ROSS and WEBSTER, Circuit Judges.

PER CURIAM.

Patrick Schmaltz appeals from his conviction of conspiracy to distribute dl-methamphetamine hydrochloride ("speed") in violation of 21 U.S.C. §§841(a)(1), 846.[1] We affirm.

1. The indictment contained five counts. The first four counts charged Ronald Weisser and/or Ronald Burns with the distribution of dl-methamphetamine hydrachloride on various dates from June 15 through August 16, 1976. The fifth count

(Continued on following page)

Schmaltz's main contention on appeal is that there was insufficient evidence to sustain his conviction. Viewing the evidence in the light most favorable to the jury's verdict, *United States* v. *Scholle*, 553 F.2d 1109, 1118 (8th Cir. 1977), we conclude that the verdict was amply supported.

In reviewing a conviction for conspiracy, the threshold question is whether the existence of a conspiracy has been established. "The offense of conspiracy consists of an agreement between the conspirators to commit an offense, attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States* v. *Skillman*, 442 F.2d 542, 547 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971). *Accord, United States* v. *Jackson*, 549 F.2d 517, 530 (8th Cir. 1977). The agreement may be established by circumstantial evidence. *United States* v. *Jackson, supra* at 530; *United States* v. *Hutchinson*, 488 F.2d 484, 490 (8th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974).

The evidence was more than sufficient to establish the existence of a conspiracy during the period named in the indictment. Two sales of "speed" on June 7 and June 9, 1976, were arranged by narcotics agents through Beckendorf, who purchased the drug at the Burns' residence. Burns arranged a sale of the drug from Weisser to an agent on June 15, 1976, at which time Weisser expressed knowledge of the prior transactions. On June

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Footnote continued—

charged Weisser, Burns, Schmaltz, Richard Weinhandl and Steven Beckendorf with conspiracy from June 7, 1976, until the date of the filing of the indictment on November 26, 1976. The substantive counts were listed as overt acts of the conspiracy. Burns and Weisser pled guilty to the substantive counts and the remaining charges against them were dismissed. Beckendorf pled guilty to the conspiracy count. Weinhandl was tried and convicted with Schmaltz.

22, 1976, two meetings were held at the Burns' residence, where purchases of the drug by an agent, Burns and Weinhandl were discussed. Two days later, an agent met with Burns and Weisser at the Burns' residence where another transaction occurred. At that meeting, Burns stated that he and Weisser had been selling the drug for the past four months and that they were going to let things "slow down" for a couple of weeks before reintroducing any quantities into the community. Further sales were made by Weisser to a narcotics agent in July and August, 1976, during which the sale of larger quantities and the purchase of precursor chemicals by Weisser were discussed.

Once the existence of a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient proof of his involvement in the scheme. *United States* v. *Russell V. Losing, Jr.*, No. 76-1040, slip op. 11-12 (8th Cir. August 10, 1977); *United States* v. *Overshon*, 494 F.2d 894, 896 (8th Cir.), *cert. denied*, 419 U.S. 853 (1974). We conclude that sufficient evidence existed to connect Schmaltz with the conspiracy. On August 26, 1976, two agents met with Weisser and Schmaltz to discuss the exchange of precursor chemicals for lower prices on larger quantities of "speed." An agent testified that during this meeting, Schmaltz asked whether the last sample given to the agent "was as good as the last you got." When the agent replied that it was of high purity, Schmaltz agreed and stated that the individual who supplied Weisser and himself produced a superior product based on the melting point of the substance. Schmaltz also stated that they had attempted to expand their operation into the Minneapolis area but that their acquisition cost for the chemical precluded their entry into that market. When an agent asked Weisser if he could buy a larger quantity of the drug, Schmaltz replied that they

would be able to accommodate him. The acquisition of precursor chemicals from the agents and of glassware needed to set up a laboratory was also discussed. Although this conversation apparently did not result in any subsequent sale or attempt to manufacture the drug, it is highly probative of Schmaltz's alleged role in the conspiracy. *See United States* v. *Russell V. Losing, Jr., supra* at slip op. 12. Schmaltz's denial that he made many of these statements and his assertion that he was not present as a participant but merely to help Weisser assess the credibility of the agents were obviously rejected by the jury, and we will not disturb the jury's findings on appeal.

We also reject Schmaltz's contention that since the government did not prove that he had knowledge of the details of the prior transactions, proof of his participation in the conspiracy was insufficient. In order to convict a defendant of conspiracy, it is not necessary to prove that he knew all of the conspirators or that he was aware of all details of the conspiracy. A showing that the defendant knowingly contributed efforts in furtherance of it is sufficient. *United States* v. *Jones*, 545 F.2d 1112, 1115 (8th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977). That showing was made here.

Schmaltz contends that he should have been granted a new trial because, after the jury was empaneled, Beckendorf pleaded guilty to the conspiracy charge. After it was revealed in chambers that Beckendorf wished to enter a plea of guilty, Schmaltz's counsel objected to acceptance of the plea but made no motion for a mistrial. The trial court then informed the jury that the Beckendorf case "has been resolved." Although perhaps the trial court should have instructed the jury that no inference from Beckendorf's absence should be drawn, *see United States* v. *McCord*, 509 F.2d 334, 346 n.35 (D.C. Cir. 1974) (en

banc), *cert. denied*, 421 U.S. 930 (1975), any prejudice resulting from the trial court's failure to do so was minimal in light of defense counsel's action in calling Beckendorf to the stand and examining him at length about the existence of the guilty plea and its terms. Under these circumstances, Schmaltz cannot complain.

Lastly, Schmaltz contends that his trial should have been severed from that of Weinhandl. A motion to sever is addressed to the discretion of the trial court, and denial of such a motion is not grounds for reversal unless clear prejudice and an abuse of discretion is shown. *United State* v. *Jackson, supra* at 523. We find no abuse of discretion here.

We have reviewed Schmaltz's other contentions and find them to be without merit.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

C1-76-32

UNITED STATES OF AMERICA

-v-

RONALD BURNS, RONALD WEISSER, PATRICK SCHMALTZ, RICHARD WEINHANDL, and STEVEN BECKENDORF

INDICTMENT

(Filed September 15, 1976)

THE GRAND JURY CHARGES:

Charge: Violation of Title 21 U.S.C., Sections 841 (a) (1) and 846

COUNT 1

On or about the 15th day of June, 1976, in the District of North Dakota, RONALD WEISSER and RONALD BURNS knowingly and intentionally did unlawfully distribute approximately 27.77 grams of dl-methamphetamine hydrochloride, a Schedule II controlled substance. (In violation of Title 21 U.S.C., Section 841 (a) (1).)

THE GRAND JURY FURTHER CHARGES:

COUNT 2

On or about the 24th day of June, 1976, in the District of North Dakota, RONALD WEISSER and RONALD

BURNS knowingly and intentionally did unlawfully distribute approximately 27.88 grams of dl-methamphetamine hydrochloride, a Schedule II controlled substance. (In violation of Title 21 U.S.C., Section 841 (a) (1).)

THE GRAND JURY FURTHER CHARGES:

COUNT 3

On or about the 14th day of July, 1976, in the District of North Dakota, RONALD WEISSER knowingly and intentionally did unlawfully distribute approximately 83.61 grams of dl-methamphetamine hydrochloride, a Schedule II controlled substance. (In violation of Title 21 U.S.C., Section 841 (a) (1).)

THE GRAND JURY FURTHER CHARGES:

COUNT 4

On or about the 16th day of August, 1976, in the District of North Dakota, RONALD WEISSER knowingly and intentionally did unlawfully distribute approximately .06 grams of dl-methamphetamine hydrochloride, a Schedule II controlled substance. (In violation of Title 21 U.S.C., Section 841 (a) (1).)

COUNT 5

1. From on or about the 7th day of June, 1976, and continuously thereafter up to and including the date of the filing of this indictment, in the District of North Dakota and elsewhere, RONALD BURNS, RONALD WEISSER, PATRICK SCHMALTZ, RICHARD WEINHANDL, and STEVEN BECKENDORF, the defendants herein, willfully and knowingly did combine, conspire, confederate, and agree together with each other and with diverse others whose names are to the Grand Jury unknown, to distribute dl-methamphetamine hydrochloride, a Schedule II con-

trolled substance, in violation of Section 841(a)(1) of Title 21, United States Code.

2. It was part of said conspiracy that the defendants and co-conspirators would and did obtain substantial quantities of dl-methamphetamine hydrochloride, a Schedule II controlled substance, from a source outside of the District of North Dakota.

3. It was further a part of said conspiracy that the defendants and co-conspirators would and did distribute said quantities of dl-methamphetamine hydrochloride, a Schedule II controlled substance, within the District of North Dakota.

4. That during the course of said conspiracy the defendants performed the following overt acts in furtherance of said conspiracy.

a. On or about June 15, 1976, defendants RONALD BURNS and RONALD WEISSER distributed approximately 27.77 grams of dl-methamphetamine hydrochloride, a Schedule II controlled substance, to Lawrence S. Saylor, a Special Agent with the North Dakota Bureau of Criminal Investigations, for the amount of $1,200.

b. That on or about the 24th day of June, 1976, RONALD BURNS and RONALD WEISSER distributed to Lawrence S. Saylor, Special Agent with the North Dakota Bureau of Criminal Investigations, approximately 27.88 grams of dl-methamphetamine hydrochloride, a Schedule II controlled substance, for the sum of $1,200.

c. That on or about the 14th day of July, 1976, RONALD WEISSER distributed to Lawrence S. Saylor, Special Agent with the North Dakota Bureau of Criminal Investigations, approximately 83.61 grams of dl-methamphetamine hydrochloride, a Schedule II controlled substance, for the sum of $3,300.

d. That on or about August 16, 1976, RONALD WEISSER distributed to Lawrence S. Saylor, Special Agent with the North Dakota Bureau of Criminal Investigations, approximately .06 grams of dl-methamphetamine hydrochloride, a Schedule II controlled substance, as a sample.

e. That on or about August 26, 1976, PATRICK SCHMALTZ stated to Lawrence S. Saylor, Special Agent with the North Dakota Bureau of Criminal Investigations, that he and RONALD WEISSER could supply Special Agent Saylor with up to 10 ounces of dl-methamphetamine hydrochloride, a Schedule II controlled substance.

f. That on or about June 7, 1976, STEVEN BECKENDORF distributed to James Lobsinger, Special Agent with the North Dakota Bureau of Criminal Investigations, approximately .9708 grams of dl-methamphetamine hydrochloride, a Schedule II controlled substance, for the sum of $65.

g. That on or about the 22nd day of June, 1976, RICHARD WEINHANDL stated to Special Agent Lawrence Saylor, Special Agent with the North Dakota Bureau of Criminal Investigations, that he would be obtaining from RONALD WEISSER 2 ounces of dl-methamphetamine hydrochloride, a Schedule II controlled substance, for distribution. (In violation of Title 21, U.S.C., Section 846.)

A True Bill

/s/ Ralph Anderson
Foreman

/s/ Harold O. Bullis
HAROLD O. BULLIS
United States Attorney